Supreme Court, U.S.
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Case No. 08-9
IN THE
Supreme Court of the United States

REUBEN WALTER THOMPSON AND PATRICIA J. THOMPSON;
AND LEONARD W. JORDAN

Petitioners

v.

UNITED STATES TRUSTEE, REGION 8

Respondent

On Petition For Rehearing For Writ of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR REHEARING FOR WRIT OF CERTIORARI

HOLLY W. SCHUMPERT
Counsel of Record

Holly W. Schumpert
100 North Main, Suite 948
Memphis, Tennessee 38103
(901) 524-1999

Steven F. Bilsky
100 North Main, Suite 405
Memphis, Tennessee 38103
(901) 525-6692

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW FOR WRIT OF CERTIORARI

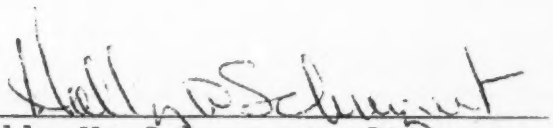
I. Whether the Court below improperly restricts the inherent authority of the court in contravention of the venue scheme applicable to cases under Title 11 of the United States Bankruptcy Code and recognized by the Supreme Court in *Marrama v. Citizens Bank of Massachusetts,* 127 S. Ct. 1105 (U.S. 2007)?

II. Whether the Court below erroneously applied the holdings in *Connecticut National Bank v. Germain,* 503 U.S. 249 (1992)?

III. Whether the Court below elevates the language of an advisory opinion above clear Congressional policy as expressed through the plain language and overarching scheme of the Bankruptcy Code?

CERTIFICATION OF COUNSEL PURSUANT TO RULE 44.2

Petitioners state that this Petition For Rehearing For Writ of Certiorari is in accord with Rule 44.2.



Holly W. Schumpert, Attorney
100 North Main, Suite 948
Memphis, Tennessee 38103
(901) 524-1999

STATEMENT SUPPORTING PETITION
FOR REHEARING FOR WRIT OF CERTIORARI

This highly important issue on appeal is of national importance in that the lower court's opinion affects both business and consumer bankruptcy cases and draws no distinction between voluntary and involuntary bankruptcy cases. With the country in an economic crisis, including the subprime mortgage crisis, high unemployment rate, increased fuel costs and the trickle down effect that is affecting large and small businesses and individuals in all levels of industry, the lower court's decision thwarts the congressionally mandated judicial goals in Federal Rule of Bankruptcy Procedure 1001 to secure the just, speedy, and inexpensive determination of every case and proceeding. This ignores the long standing trend of flexibility under the Bankruptcy Code.

The lower court's decision makes 28 U.S.C. §1406 applicable to Title 11 cases, disregards bankruptcy specific venue statutes 28 U.S.C. §§1408 and 1412 and Federal Rule of Bankruptcy Procedure 1014, which provide that the Court may retain an improperly venued Title 11 case in the interest of justice or for the convenience of the parties. The lower court's opinion further fails to recognize that section 1406 harmoniously co-existed with bankruptcy specific venue statutes 28 U.S.C. §§1472, 1475 and 1477; that the 1984 amendments to the venue statutes were in response to the non-venue constitutional concerns raised in *N. Pipeline Constr. Co. V. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); and that the 1984 amendments were expressly

not intended to make substantial changes in venue provisions. It is noteworthy that nothing in Title 28 prohibits the bankruptcy court from retaining a technically improperly venued Title 11 case; that the venue statutes do not rise to the status of subject matter jurisdiction; and further, that the Bankruptcy courts have the inherent authority to retain such cases based on the particular facts and circumstances of the case to be determined on a case by case basis. 11 U.S.C. 105; *Marrama v. Citizens Bank of Massachusetts*, 127 S. Ct. 1105 (2007).

Section 1406 did not and still does not allow for the retention of a case, however repealed section 1477 did allow for retention as did the companion section under the prior statutory scheme, former 28 U.S.C. §1475. Section 1475 was ostensibly brought into 28 U.S.C. §1412 which allows for a change of venue in cases under Title 11 to any other district. The lower court correctly held that a case that is properly venued in the first instance could be transferred to a district in which it could not have originally been brought under section 1412 and Federal R. Bankr. P. 1014, if in the interests of justice or for the convenience of the parties; and that fixing this problem, if any, should be left to Congress. However, Congress has already addressed the question before this court in that the duplication of repealed sections 1475 and 1477 was addressed by drafting and implementing section 1412 to deal with the two repealed sections. Congress did not make a distinction between cases with proper or improper venue in section 1412 as was set forth in repealed sections 1475 and

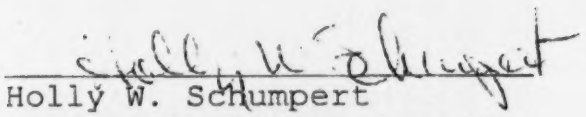
1477. Specifically, Congress ensured that the language of section 1412 was generic enough that it would apply to both cases filed under Title 11 in proper and improper venue. As recognized favorably in *In re Germain*, Judge Learned Hand advises that statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." *Germain* at 255, n. 1 (citing *Lehigh Valley Coal Co. V. Yensavage,* 218 F. 547, 553 (CA2 1914), cert. denied, 235 U.S. 705 (1915)). Surely Congress did not expect that an advisory Committee Note to a procedural rule would override a longstanding and flexible venue scheme for cases under Title 11; in addition to their stated intention that the changes were being made purely in response to the Supreme Court's *Marathon* decision and not as a drastic change to the overall statutory scheme. "Common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it" when rendering an opinion on the statutory interpretation of these statutes. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 611, n.4 (1991)). The plain language of the existing statutes without the context within which they came into existence, is not sufficient in deciding this important case.

In conclusion, this highly important national issue must be decided in the context of the 1984 amendments. By reviewing the statutory scheme prior to the 1984 amendments and recognizing that properly or improperly venued bankruptcy cases were treated identically, providing the bankruptcy court the inherent authority to retain such cases. The lack of a Title 28 provision that

prohibits the bankruptcy court from retaining improperly venued Title 11 cases, coupled with the specific language of the bankruptcy specific venue statutes and the permissive language that accompanies these Title 11 venue provisions, preserves the venue scheme contemplated prior to the 1984 amendments. Further, reviewing the purpose of the 1984 amendments and the constitutional concerns that were being addressed at that time, none of which were specifically venue related, and the stated congressional intent not to substantially change venue provisions, it becomes clear that the bankruptcy courts have the inherent authority to retain the improperly venued Title 11 cases in the interest of justice or for the convenience of the parties to be determined on a case by case basis.

Petitioners urge this Honorable Court to reverse the lower Court's opinion and hold that the Court in *In re Jordan*, properly held that the court did have the authority to retain a technically improperly venued bankruptcy case in the interest of justice or for the convenience of the parties; that there is nothing in Title 28, Title 11, or the Federal Rules of Bankruptcy Procedure that prohibit this retention and that 28 U.S.C. §1412 applies to all cases under Title 11 in regard to change of venue, regardless of whether venue was initially proper or not. Further, Petitioners submit that the development of a convoluted venue scheme is not supported by tenants of statutory interpretation, legislative history, or logic.

Respectfully submitted,



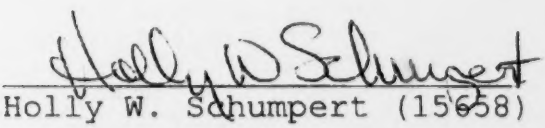
Holly W. Schumpert
100 North Main, Suite 948
Memphis, Tennessee 38103
(901)524-1999

Attorney for Petitioners

CERTIFICATE OF SERVICE

I declare under penalty that three copies of the foregoing Petition for Rehearing For Writ of Certiorari were served on October 31, 2008 on the following via First Class, Postage Pre-paid U.S. Mail.

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001



Holly W. Schumpert (15658)

100 North Main, Suite 948
Memphis, Tennessee 38103
(901)524-1999

Counsel for Petitioners-Appellants

CERTIFICATE OF COMPLIANCE

Case No.

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REUBEN WALTER THOMPSON AND PATRICIA J. THOMPSON;
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Petitioners
v.

UNITED STATES TRUSTEE, REGION 8

Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for writ of certiorari contains 1017 words, excluding the parts of the petition that are exempt by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed This the 31st day of October, 2008.

Holly W. Schumpert
Counsel of Record for
Petitioners
100 North Main, Suite 948
Memphis, Tennessee 38103
(901)524-1999